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MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION FACT SHEET ON PARENTAL LEAVE

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Under federal and state law, certain employees may take an unpaid leave from work at the birth or adoption of a child. Federal and state law may also allow a pregnant woman who develops a serious health condition to take an unpaid leave of absence if her doctor certifies the need for such a leave.

Parental Leave

Massachusetts Maternity Leave Act, M.G.L. c. 149, § 105D, allows a female employee to take up to 8 weeks of unpaid leave at (1) the birth of a child, (2) the adoption of a child under 18 years old, or (3) the adoption of a person under 23 years old who is mentally or physically disabled.

Eligibility: To be eligible, the employee must have worked for the employer in a full-time position for at least 3 months or finished a probationary period (which cannot exceed 6 months), and the employer must employ at least 6 employees. The employee must give the employer 2 weeks notice of her departure date and notice that she intends to return to her job.

Job restoration: Under most circumstances, the employer must restore the employee to her job or to a reasonably similar position with the same status, pay, length of service credit and seniority.

Male employees: Because state and federal law prohibit sex discrimination in employment, male employees may have a right to take the same 8 weeks of leave a female employee is entitled to take at the adoption of a baby, and to take a certain amount of leave at the birth of a child.

The MCAD enforces the Massachusetts Maternity Leave Act. If you think your employer has violated this law, contact the MCAD.

Family & Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, is a federal statute that allows eligible male and female employees to take up to 12 weeks of unpaid leave at the birth or adoption of a child.

Eligibility: To be eligible, your employer must have 50 or more employees; and you must have worked for your employer for 12 months and at least 1,250 hours in the prior year. **Job restoration:** The employer ordinarily must restore you to the same or equivalent job when your FMLA leave ends.

The employer can require the employee to use paid leave, such as vacation time, personal leave, or sick leave, for parental leave taken under the FMLA.

For more detailed information on rights and obligations under the FMLA contact the U.S. Department of Labor, Wage & Hour Division.

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Pregnancy-Related Disability Leave

If an employee develops a serious health condition during pregnancy, and her doctor certifies her need for leave, she may be able to take unpaid leave under the FMLA or she may be considered to be a "qualified handicapped person" entitled to a leave of absence as a reasonable accommodation. See MCAD Fact Sheet on Employment Discrimination on the Basis of Disability.

You may be entitled to leave in addition to the (8) weeks as accommodation for a pregnancy-related disability.

Use of Paid Leave

The employer may restrict the use of paid sick leave to leave taken by a female employee at the birth of a child or leave taken because of a pregnancy-related health condition.

Employer's Parental Leave Policies Must Be Consistent with Other Leave Policies

- * If the employer provides pay for all other leaves of absence, the employer must also provide pay for parental leave.
- * If the employer provides pay for only medical leaves of absence, the employer must also provide pay for a pregnancy-related disability, but is not required to provide pay for leaves involving normal pregnancies, adoption by female employees, or leaves involving birth or adoption by male employees.
- * If the employer provides pay for benefits, plans, or programs associated with other types of temporary disability, the employer must provide pay for benefits, plans or programs associated with birth-related parental leave taken by female employees.
- * Any employer policy or collective bargaining agreement that provides for greater or additional benefits than those required by law must be followed.

Employees should consult their personnel officer, benefits officer, or union officer to receive the most current information about their employer's parental leave policies.

If you believe you have been discriminated against, contact the MCAD immediately because, in most circumstances, you must file a charge at the MCAD within six (6) months of the alleged discriminatory action.

**MCAD FACT SHEET
SEXUAL HARASSMENT IN EMPLOYMENT**

Massachusetts and federal law prohibit both sexual harassment in employment and retaliation against persons who resist or object to sexual harassment or cooperate in investigations of sexual harassment. The Massachusetts Commission Against Discrimination enforces these laws.

Definition: Sexual harassment consists of:

- (1) any verbal or physical acts or conduct,
- (2) of a sexual nature
- (3) which is unwelcome by the victim, and

(4) (a) submission to such conduct is necessary to obtain or keep your job, or (b) submission or resistance to such conduct affects your pay, job assignments, promotions, or other aspects of your job, or (c) the conduct unreasonably interferes with doing your job, or creates an intimidating, hostile, humiliating or offensive working environment.

Sexual harassment includes both overt acts of oral, written, or physical abuse and more subtle, but equally damaging forms of offensive conduct such as the use of epithets, slurs, or the display or circulation of offensive, graphic or written material.

Unwelcome means "not received by choice or willing consent, regarded as undesirable or offensive". Whether or not something is unwelcome is decided by the victim. Sexual harassment may exist even in the absence of economic or tangible job consequences.

Employer Responsibility

1. Employers may be held responsible for acts of sexual harassment and retaliation by their supervisors even if the employee has not complained.
2. Employers may also be responsible for the acts of co-workers if the employer knew or should have known of the conduct and failed to take prompt and effective corrective action.
3. Employers may be responsible for the acts of non-employees at work if the employer knew or should have known of the conduct and failed to take prompt and effective corrective action within the employer's legal ability to do so.
4. Employers must investigate complaints of sexual harassment or retaliation carefully and thoroughly.
5. Employers should have effective procedures in place to enable an employee to complain of sexual harassment or retaliation without having to complain to the offending person.

A faint, grayscale background image of a classical building with four prominent columns and a triangular pediment, resembling a library or institutional building.

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Corrective Action:

When harassment or retaliation has occurred, the employer must take prompt and effective corrective action designed to:

- do whatever is necessary to end the harassment or retaliation,
- restore lost employment benefits and opportunities,
- prevent the misconduct from recurring, and
- prevent retaliation.

Disciplinary action against the offending person, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.

If you believe you have been discriminated against, contact the MCAD immediately because, in most circumstances, you must file a charge at the MCAD within six (6) months of the alleged discriminatory action.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

PRE-EMPLOYMENT INQUIRIES FACT SHEET

Massachusetts law guarantees that no person shall be denied the right to work because of his or her race, color, religion, national origin, sex, sexual orientation, age (over 40), criminal record, or mental or physical handicap/disability. In order to comply with this law, an employer should generally not ask on a job application or during an interview any question that:

- * identifies a person as being within a protected category;
- * results in the screening out of members in a protected category; or
- * is not a valid basis for predicting successful job performance.

Employers with fewer than six employees are not subject to this law.

Non-profit clubs, associations or corporations which are exclusively social are also not subject to this law.

As a general rule, an employer may seek information which is directly related to the applicant's ability to perform the job for which he or she is applying. The following chart compares questions that may appropriately be asked on employment application forms or during employment interviews with questions that should not be asked.

TOPIC	EMPLOYER MAY ASK	EMPLOYER MAY <u>NOT</u> ASK
Age	<p>Are you under 18?</p> <p>Questions about age may be allowed if necessary to satisfy provisions of a state or federal law (for example, certain public safety positions have age limits for hiring and retiring).</p>	<p>When were you born?</p> <p>How old are you?</p> <p>Are you over 40?</p> <p>What is your date of birth?</p>

<p>Handicap/ Disability</p>	<p>Can you perform any or all of these specific job functions?</p> <p>Please describe or demonstrate how you would perform a specific task. (This request should be asked all applicants unless there is an obvious disability or voluntarily disclosed hidden disability related to a job function. The employer may need to provide reasonable accommodation for the demonstration.)</p> <p>Can you meet the attendance requirements?</p> <p>What was your attendance record at your prior place of employment?</p> <p>An employer may invite applicants to voluntarily disclose their disability for purposes of assisting the employer in its affirmative action efforts. An employer should make it clear that information will be used solely in connection with its affirmative action efforts, will be kept confidential, and that non-disclosure will not subject the applicant to adverse treatment.</p>	<p>Do you have a handicap/disability?</p> <p>Do you have any job-related handicaps/limitations that would prevent you from doing the job?</p> <p>Have you ever received Workers' Compensation?</p> <p>Have you ever been hospitalized/treated for medical or mental conditions?</p> <p>Have you ever been addicted to illegal drugs or treated for drug abuse/alcoholism?</p> <p>Have you ever been absent from work due to illness?</p> <p>Do you have AIDS?</p> <p>No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such a public or private facility or facilities and is no longer under treatment directly related to such admission.</p> <p>An employer may not inquire as to the nature, severity, treatment, or prognosis of an obvious disability or of a hidden disability voluntarily disclosed by the applicant.</p>
<p>National Origin/ Ancestry</p>	<p>Are you legally authorized to work in the United States?</p>	<p>Where were you born?</p> <p>Where are your parents/spouse from?</p> <p>What is the origin of your name?</p>

		An employer may not ask the language, national origin, ancestry or ethnicity of an applicant, his/her parents or spouse.
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Race/Color	No questions (except for affirmative action purposes only).	What is your race? color? An employer may not ask for a photograph to accompany an application.
Religious Creed	No questions.	To what religious denomination, church or synagogue do you belong

		<p>(or any related organizations)?</p> <p>What are your religious obligations?</p> <p>What religious holidays do you observe?</p> <p>Do go to church/temple regularly?</p>
Sex (Gender)	Generally, no questions. However, questions regarding gender may be permissible if they relate to a legitimate requirement for a particular position (for example, the sex of an applicant for an acting role of a female character, or a prison guard who performs strip searches).	<p>What is your maiden name? (or any question that pertains to only one sex.)</p> <p>Do you have/plan to have children?</p> <p>Do you have child care arrangements?</p> <p>No questions may be asked of only one sex.</p>
Sexual Orientation	No question.	<p>Are you gay/lesbian/bisexual/heterosexual?</p> <p>Why aren't you married?</p> <p>Are you engaged?</p> <p>Do you plan on getting married?</p> <p>Questions about relationships or living arrangements.</p>

Criminal Record	<p>Employers may ask the following series of questions:</p> <ol style="list-style-type: none"> 1. Have you ever been convicted of a felony? 2. Have you ever been convicted of a misdemeanor within the past 5 years (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? 	<p>It is unlawful for an employer to make any inquiry of an applicant or employee regarding:</p> <ol style="list-style-type: none"> 1. An arrest, detention or disposition regarding any violation of law in which no conviction resulted. 2. First convictions for the
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	<p>3. Have you ever completed a period of incarceration within the past 5 years for any misdemeanor (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)?</p> <p>4. If the answer to question number 3 above is "yes" please state whether you were convicted <u>more than 5 years ago</u> for any offense (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace).</p> <p>Some employers are authorized to request, receive, view and/or hold criminal offender record information pursuant to state or federal law.</p> <p>Any inquiry into the criminal record of an applicant must also contain language pursuant to M.G.L. c.276 §100A.</p>	<p>misdemeanors of drunkenness, simple assault, speeding, minor traffic violations (moving traffic violations other than reckless driving, driving to endanger and motor vehicle homicide), affray or disturbance of the peace.</p> <p>3. Any conviction of a misdemeanor where the date of the conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 5 or more years prior to the date of inquiry, unless such a person has been convicted of any offense within 5 years immediately preceding the date of the inquiry.</p> <p>No person shall be held under any provision of law to be guilty of perjury or of otherwise giving a false statement by reason of his/her failure to recite or acknowledge such information as s/he has a right to withhold by 804 C.M.R. 3.02.</p>
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Education/ Experience/ References/ Organizations	<p>What school, college or vocational program did you attend?</p> <p>Did you graduate?</p> <p>What is your work experience?</p> <p>Do you have any references?</p> <p>Inquiry into the work experience shall also contain a statement that the applicant may include in such history any verified work</p>	<p>Questions about education or work experience designed to determine an applicant's age.</p> <p>Inquiry into the organizations which the applicant for employment is a member, the nature, name or character of which would likely disclose the applicant's protected class status.</p>
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	performed on a volunteer basis.	
Military Experience	<p>Are you a U.S. Veteran?</p> <p>What is your U.S. military service history?</p>	<p>Are you receiving a service-connected disability pension?</p> <p>What is your foreign military service history?</p> <p>What was the nature of your discharge?</p>
Medical Examinations	Once an offer of employment has been made, an employer may condition that offer on the results of medical examination conducted solely for the purpose of determining whether the employee, with or without reasonable accommodation, is capable of performing the essential functions of the job.	An employer may not ask an applicant to take a medical examination prior to making an offer of employment to that applicant.
Lie Detector Test	No questions.	It is unlawful to require or administer a lie detector test as a condition of employment or continued employment.

Of course, there are other questions not listed above that could be construed as attempting to elicit information for the purpose of discrimination on the basis of a protected category. If you require further information about the legality of certain pre-employment inquiries, refer to M.G.L. c.151B §4, 804 C.M.R. 3.01 *et seq.*, MCAD Handicap Guidelines, or contact the MCAD at (617) 727-3990.

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MCAD FACT SHEET

EMPLOYMENT DISCRIMINATION ON THE BASIS OF DISABILITY

Under Massachusetts law (Chapter 151B) and the federal Americans with Disabilities Act, it is illegal for an employer, an employment agency, or a labor organization (such as a union) to discriminate against someone based on his or her disability or handicap. The Massachusetts Commission Against Discrimination enforces these laws as well as other Massachusetts laws that prohibit disability discrimination in housing, public accommodations, and credit.

"Qualified Handicapped Persons" Are Protected By These Laws

1. What is a handicap or a disability?

A handicap or a disability is a physical or mental condition that substantially limits one or more of a person's major life functions. Examples of major life functions include seeing, hearing, mobility, and working. Massachusetts law uses the word "handicap" and the federal Americans with Disabilities Act uses the word "disability"-- the laws are very similar.

Examples of impairments that may limit a major life function include paraplegia, blindness, deafness, epilepsy, AIDS or being HIV positive, diabetes, heart disease, cancer, mental retardation, psychiatric disabilities and learning disabilities.

Alcoholism is also a disability covered by these laws, but recreational use of alcohol is not covered. People with addictions to illegal substances who are currently using drugs illegally are not protected. Persons who are not current illegal drug users but are discriminated against based on their past history of drug addiction are protected.

The law protects people who are discriminated against based upon their record of disability. For example, a person who has a history of hospitalization for a psychiatric disability but who is not presently mentally ill is protected if s/he is refused employment based on her/his history of hospitalizations. In addition, the law protects people who are discriminated against based upon other people's belief that they are disabled, even if they are not disabled. A person who is fired from his job because the employer believes s/he has AIDS is protected under the law even if the employee does not have AIDS.

2. Who is "qualified"?

In order to be protected, a person with a disability must be "qualified". "Qualified" means able to perform the essential functions of the job with or without reasonable accommodation.

- **Essential Functions:** The law recognizes that jobs may have many functions. Some parts of the job are essential and some are not. If you can do the essential functions of a job, you cannot be discriminated against because of your disability. For example, a person who has a disability applies for a job as one of a group of ten mail clerks for a large company. Because of his/her

disability s/he does not drive. The main functions of the mail clerk job are sorting and distributing incoming mail to various departments and processing outgoing mail. Sometimes one of the mail clerks is asked to perform miscellaneous tasks which involve driving, such as picking up supplies. Driving would probably not be an essential function of the job of mail clerk and so it would be illegal to refuse to hire the applicant because his/her disability prevented him/her from driving.

- **Reasonable Accommodation:** An employer must make reasonable accommodations to allow a disabled person to work. Reasonable accommodations may include changes in the physical work area such as installing a ramp or providing adaptive equipment such as an accessible telephone (such as a TTD), making changes in job requirements such as assigning certain non-essential job functions to another employee, allowing an employee to perform a job in a different way (for example, sitting down instead of standing up), reassigning an employee to a vacant position for which s/he is qualified, or making changes in work schedules to allow employees to take periodic rests or keep medical appointments. An employer may require a person who needs a reasonable accommodation to provide documentation of her/his disability and the need for the reasonable accommodation. Although an employer does not necessarily have to provide the exact accommodation requested, failure to provide a reasonable accommodation may violate the law.

- **Undue Hardship:** An employer does not have to provide an accommodation if it would cause undue hardship. Some of the factors to be considered in determining undue hardship are: the nature and cost of the accommodation needed; the overall size and resources of the employer's business; the number of employees; the number and type of facilities, and the size of budget; and the composition and structure of the employer's work force.

- **Reasonable Standards:** An employer is permitted to establish reasonable qualification standards for applicants and employees. Examples of such qualification standards are the ability to type 60 words a minute, a Master's degree in Library Science, or at least 2 years of nursing experience. An employer is permitted to reject a person with a disability who is unable to meet these qualification standards with reasonable accommodation unless the qualification standards are an excuse for illegal discrimination.

Employment Tests

Employers are permitted to test applicants and employees to make sure that they can perform essential job functions, but they must give the test in a way that does not unfairly discriminate against a person because of his or her disability. For example, a person with a speech impediment who is applying for a clerical position may not perform well on a test which requires oral responses. However, if the job does not require clear speech, another type of test must be given (such as a written test) which does not unfairly discriminate against the applicant.

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AGE DISCRIMINATION

Federal law and Massachusetts law both prohibit employers from discriminating against their employees based on their age. The Massachusetts Commission Against Discrimination (MCAD) is the state agency that enforces these laws in Massachusetts. Employers of six or more individuals are covered by the state statute. The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces the federal statute. Employers of twenty or more individuals are covered by the federal statute.

These laws mean that if you are 40 years old or older an employer may not take any adverse employment actions against you because of your age. This includes:

- refusing to hire
- terminating, discharging, or laying off
- refusing to promote
- paying lower wages or giving fewer benefits, or
- discriminating against you in any other term or condition of employment, including harassment.

An employer may have violated the law if your age was the reason or one of the reasons for the action taken against you. If you were terminated and replaced because of your age, your replacement does not have to be under 40 in order for you to have a valid claim. However, an employer does not necessarily violate the law merely because it terminated you in favor of someone younger, or hires or promotes someone younger instead of you.

Your employer generally may not require you to retire at a certain age. There are exceptions to this rule for certain public employees and for certain highly-compensated executives.

Waiver of Rights: Employees are sometimes asked to sign statements releasing their employers from any liability they may have for violating age discrimination laws. If you are asked to sign such a statement, you may wish to consult an attorney. However, you should know such waivers may not be enforceable unless certain conditions are met. Some of the conditions are:

- the waiver must be clear and understandable.
- the employer has to be offering you something in return (such as increased severance benefits).
- the waiver must specifically refer to the Age Discrimination in Employment Act (ADEA) and G.L. c.151B.
- the employer must advise you that you can consult a lawyer, give you 21 days to consider the agreement, and give you 7 days to revoke it even after you have signed.
- if you are part of a group layoff, under federal law your employer may have to provide you with even more time (45 days) to consider any waiver of rights. In addition, your employer may have to give you certain information, including the ages of the employees being laid off and the ages of the employees being retained.

If you believe you have been a victim of age discrimination, you have the right to file a complaint with the MCAD within six (6) months of the alleged discriminatory act.

